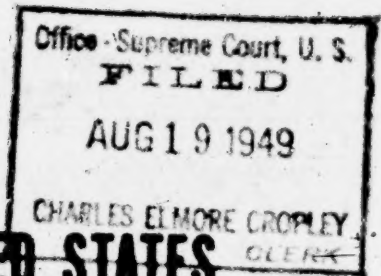


LIBRARY
SUPREME COURT, U. S.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No.  20

20

OSCAR F. TREICHLER, EXECUTOR OF THE ESTATE OF
FRED A. MILLER,

Appellant,

vs.

STATE OF WISCONSIN

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF BY AMICUS CURIAE

J. GILBERT HARDGROVE,
Amicus Curiae

MILLER, MACK & FAIRCHILD,
Of Counsel

INDEX

SUBJECT INDEX

	Page
Introduction	1
Official Report of Opinion in Lower Court	2
Grounds on which Jurisdiction is Invoked	2
Statement of Case	2
Assigned Errors	2
Statutes	2
Outline of Argument	3
Argument	5
Conclusion	24

TABLE OF CASES CITED

<i>Frick v. Pennsylvania</i> , 268 U.S. 473 (1925)	9
<i>Opinion of the Justices</i> , 85 N. H. 572, 154 Atl. 633 (1931)	6

STATUTES CITED

Constitution of the United States, 14th Amendment	1, 24
Internal Revenue Code, Section 813(b)	3, 6, 7
Wisconsin Statutes:	
Sections 72.01-72.24	5, 7, 11
Section 72.04(8)	20
Sections 72.50-72.61	6, 8, 11
Section 72.50	7, 8
Section 72.56	8

Section 72.74 1, 2, 3, 5, 11

Section 72.74(2)

Wisconsin Session Laws:

Laws of 1903, Chapter 44

Laws of 1931, Chapter 426

Laws of 1935, Chapter 15, Section 3

7

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 547

OSCAR F. TREICHLER, EXECUTOR OF THE ESTATE OF
FRED A. MILLER,

Appellant,

vs.

STATE OF WISCONSIN

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF BY AMICUS CURIAE

This brief is filed with leave of court as *Amicus Curiae*

Fred A. Miller, a Wisconsin resident, died on December 19, 1943, leaving, in addition to his principal estate in Wisconsin, real and tangible personal property in Florida and in Illinois. Under a Wisconsin statute (Sec. 72.74, Wis. Stats., 1943) imposing an emergency tax (in addition to inheritance and Wisconsin estate taxes), the State has in part based and measured that tax on and by the value of property in Florida and Illinois. This, it is submitted, constitutes taking property without due process of law in violation of the Fourteenth Amendment to the Federal Constitution.

OFFICIAL REPORT OF OPINION IN LOWER COURT

Decision rendered December 15, 1948.

Estate of Miller, 254 Wis. 24 (Adv. Sheets), 35 N.W.
(2d), 404.

GROUND ON WHICH JURISDICTION IS INVOKED

As construed and applied in this case, Section 72.74, Wis. Stats., under which the emergency tax was assessed, takes property without due process of law in that the tax thereunder is in part based upon and measured by the value of property without the State of Wisconsin and beyond its taxing power.

STATEMENT OF CASE

The facts in the *Estate of Fred A. Miller* which this Court must consider on this appeal are set out in detail in the appellant's brief, and will not be restated herein.

ASSIGNED ERRORS

The *amicus curiae* has no standing to assign error. However the basis for this argument is sufficiently laid in the appellant's assignment of error.

STATUTES

The references to the Wisconsin Statutes herein are to the statutes of 1943. These are set out in the appellant's brief. Some will be quoted in the body of this brief.

OUTLINE OF ARGUMENT

I. Section 72.74 of the Wisconsin Statutes, which levies the EMERGENCY TAX, and which is herein claimed to result in a deprivation of property without due process of law, is one of three interrelated Wisconsin tax statutes. The taxes levied by the other two statutes are herein referred to as the NORMAL TAX and the WISCONSIN ESTATE TAX. An understanding of the problem requires an understanding of all three.

II. The NORMAL TAX is an unexceptional state inheritance tax. It is levied only on property within the state, and it is of importance here only in so far as it is incorporated by reference into the Wisconsin Estate and Emergency Tax Laws.

III. The WISCONSIN ESTATE TAX was enacted to take advantage of the credit for state taxes granted by Section 813 (b) of the Internal Revenue Code. It is equal to the excess (if any) of the amount of the federal 80% credit over the aggregate amount of Wisconsin and other state death duties. It applies to only a limited number of Wisconsin estates, and its original effect was to require such estates to pay minimum state death duties exactly equal in amount to the federal 80% credit.

IV. The WISCONSIN ESTATE TAX is theoretically an *ultra vires* tax since it is measured by a decedent's federal estate which may include property beyond the taxing jurisdiction of Wisconsin. It is saved from unconstitutionality only by the fact that it diverts to the state tax moneys which would otherwise have to be paid to the federal government, and hence it does not result in a deprivation of property.

V. The EMERGENCY TAX is a tax equal in amount to 30% of the sum of the Wisconsin Normal and Estate Taxes. When applied to Wisconsin estates which are subject to the Wisconsin Estate Tax, it has the same inherent vice as the Wisconsin Estate Tax, being measured, not by the decedent's Wisconsin estate, but by his federal estate containing all his property wherever situated. At the same time, being levied in excess of the compensating factor of the 80% credit, it causes a deprivation of property without due process of law.

VI. The extra-jurisdictional operation of the EMERGENCY TAX can be further seen from a comparison of the tax the Miller Estate would have had to pay had it owned no property beyond the taxing jurisdiction of Wisconsin. This indicates that \$20,203 of the Emergency Tax paid by the Miller Estate is attributable to and measured by property located in Florida and Illinois.

VII. The extra-jurisdictional operation of the EMERGENCY TAX can be seen with especial clarity in cases where the estate of a Wisconsin decedent contains property beyond the taxing jurisdiction of Wisconsin, but where no death duties have been paid to any states other than Wisconsin. In such circumstances it is possible for the Emergency Tax to exceed the value of the entire Wisconsin estate.

VIII. The preceding examples show that in all cases where Wisconsin estates are subject to the Wisconsin Estate Tax, the EMERGENCY TAX constitutes an outright adoption by the State of Wisconsin of a portion of the Federal tax structure. Such action by a state cannot be reconciled with the rule of *Frick v. Pennsylvania*.

A R G U M E N T

I.

Section 72.74 of the Wisconsin Statutes, which levies the **EMERGENCY TAX**, and which is herein claimed to result in a deprivation of property without due process of law, is one of three interrelated Wisconsin tax statutes. The taxes levied by the other two statutes are herein referred to as the **NORMAL TAX** and the **WISCONSIN ESTATE TAX**. An understanding of the problem requires an understanding of all three.

Three separate, but interrelated, Wisconsin Tax Statutes are involved in this appeal. For purposes of consistency and clarity these shall hereinafter be referred to as (1) the Normal Tax, (2) the Wisconsin Estate Tax, and (3) the Emergency Tax. It is the Emergency Tax which appellant contends has deprived him of property without due process of law. Since, however, the Emergency Tax is expressed in terms of the other two taxes, an understanding of all three is necessary in order to arrive at an understanding of the problem. We shall thus discuss these taxes individually in the order of their enactment.

II.

The **NORMAL TAX** is an unexceptional state inheritance tax. It is levied only on property within the state, and it is of importance here only in so far as it is incorporated by reference into the Wisconsin Estate and Emergency Tax Laws.

The Normal Tax was originally enacted by Chapter 44 of the Wisconsin Laws of 1903, and it now appears as Sections 72.01 through 72.24 of the Wisconsin Sta-

tutes. It is an ordinary, graduated, succession tax levied on the transfer of property passing by bequest or intestacy. It has varying rates and exemptions which are dependent on the relationship of the decedent to the recipient. It makes no attempt to tax property which is not within the taxing jurisdiction of Wisconsin, and it is of concern in the instant case only in so far as it is incorporated by reference into the statutes enacting the Wisconsin Estate and Emergency Taxes.

III.

The WISCONSIN ESTATE TAX was enacted to take advantage of the credit for state taxes granted by Section 813 (b) of the Internal Revenue Code. It is equal to the excess (if any) of the amount of the federal 80% credit over the aggregate amount of Wisconsin and other state death duties. It applies to only a limited number of Wisconsin estates, and its original effect was to require such estates to pay minimum state death duties exactly equal in amount to the federal 80% credit.

The Wisconsin Estate Tax was enacted by Chapter 426 of the Wisconsin Laws of 1931, and it appears as Sections 72.50 through 72.61 of the Wisconsin Statutes. It was copied from New Hampshire House Bill No. 227 which was the subject of the New Hampshire case, *Opinion of the Justices*, 85 N.H. 572, 154 Atl. 633 (1931), which will be further discussed hereinafter. The purpose of the enactment of the Wisconsin Estate Tax was to secure for the state full benefit of the 80% credit for state taxes paid which is granted against the federal basic estate tax by Section 813 (b) of the Internal Revenue Code. This federal basic tax is a graduated estate tax measured by the

federal estate of a decedent, containing all of his property located in any state or territory. By virtue of Section 813 (b) a credit is allowed against this federal tax, up to 80% thereof, for any death duties which may be paid to any states or territories. The actual language of Section 813 (b) granting this 80% credit is as follows:

[I.R.C. Sec. 813]

"(b) Estate, Succession, Legacy, and Inheritance Taxes. The tax imposed by section 810 or 860 shall be credited with the amount of any estate, inheritance, legacy, or succession taxes actually paid to any State or Territory or the District of Columbia, or any possession of the United States, in respect of any property included in the gross estate (not including any such taxes paid with respect to the estate of a person other than the decedent). The credit allowed by this subsection shall not exceed 80 per centum of the tax imposed by section 810 or 860 * * *"

On the theory that it is immaterial to a taxpaying estate whether its taxes go to the federal or state government, the State of Wisconsin, like a number of other states, took measures to ensure that its death duties would be sufficient at least to exhaust this 80% credit. It accomplished this result by enacting the Wisconsin Estate Tax, and making it equal in amount to the excess (if any) of the 80% credit over the aggregate of all death duties (including the Normal Tax) paid to Wisconsin and other states. The statutory language which is material to the present discussion is as follows:

"72.50 Estate tax imposed. In addition to the taxes imposed by sections 72.01 to 72.24, an estate tax is hereby imposed upon the transfer of all estates which are subject to an estate tax under the provisions of the United States revenue act of 1926, and amendments thereto, where the decedent at the time of his decease was a resident of this state. The amount of

said estate tax shall be equal to the extent, if any, of the excess of the credit of not exceeding 80%, allowable under said United States revenue act, over the aggregate amount of all estates, inheritance, transfer, legacy and succession taxes paid to any state or territory or the District of Columbia, in respect to any property in the estate of said decedent. Provided, that such estate tax hereby imposed shall in no case exceed the extent to which its payment will effect a saving or diminution in the amount of the United States estate tax payable by or out of the estate of the decedent had sections 72.50 to 72.61 not been enacted. The tax imposed herein shall be collected by the several county treasurers for the use of the state, and shall be accounted for and paid into the state treasury within the time and in the manner specified in section 72.19. [1931 c. 426; 1945 c. 33]

"72.56 Intent of section 72.50 to 72.61. It is hereby declared to be the intent and purpose of sections 72.50 to 72.61 to obtain for this state the benefit of the credit allowed under the provisions of said United States revenue act, to the extent that this state may be entitled by the provisions of said act, by imposing additional taxes and the same shall be liberally construed to effect this purpose. [1931 c. 426]"

It should be noted that in the great majority of Wisconsin estates, either no federal tax is levied, or if there is a federal tax, the Normal Tax exceeds the amount of the 80% credit. In such estates the Wisconsin Estate Tax does not come into play at all. Only in occasional estates, where a considerable amount of money is involved, or where the Normal Tax rates are kept low through wide distribution of the property among numerous close relations, is the Wisconsin Estate Tax applied. It is in these latter estates alone that the problem presented in the instant case arises.

IV.

The WISCONSIN ESTATE TAX is theoretically an *ultra vires* tax since it is measured by a decedent's federal estate which may include property beyond the taxing jurisdiction of Wisconsin. It is saved from unconstitutionality only by the fact that it diverts to the state tax moneys which would otherwise have to be paid to the federal government, and hence it does not result in a deprivation of property.

This Court, in the case of *Frick v. Pennsylvania*, 268 U. S. 473 (1925), has held it a deprivation of property without due process of law for a state to measure a tax directly or indirectly by the value of real or tangible personal property located outside the boundaries of the state. At the same time it is obvious that, whenever the Wisconsin Estate Tax is applied to the estate of a decedent who died owning property outside the taxing jurisdiction of Wisconsin, the Wisconsin Estate Tax is in part measured by the value of that out-of-state property. The reason for this is that the Wisconsin Estate Tax is determined, not by the value of the decedent's Wisconsin estate, but by the amount of his federal 80% credit. This 80% credit is measured in turn by the federal basic tax which in its turn is measured by the decedent's federal estate containing all his property, wherever situated.

—It may thus be concluded that the Wisconsin Estate Tax is, at least in theory, an *ultra vires* tax, since, in the words of the *Frick* case, it is measured by a standard which takes no account of the distinction between what the state has power to tax and what it has no power to tax. This would be sufficient to render it invalid under the *Frick* rule, were it not for the further fact that it cannot, by its terms, cost the taxpayer any money. The Wisconsin

Estate Tax operates only to raise state death duties to the amount of the federal 80% credit, and that amount the taxpayer is obligated to pay to someone in any event. If he did not pay it to the state, he would have to pay it to the federal government instead.

This extra-jurisdictional operation of an identical state estate tax, and the manner in which the federal 80% credit provides a compensating factor, has been recognized by the Supreme Court of New Hampshire, in *Opinion of the Justices, supra*. The New Hampshire Court discussed the question as follows:

[154 Atl. p. 634]

"The bill provides for the imposition of a tax upon property passing by will or inheritance in such an amount as will make the total of such taxes laid by states, etc., equal to the amount deductible from the federal estate tax, because so laid.

"It makes the imposition of the proposed tax dependent upon the right to deduct the same from the amount of the federal estate tax, which would otherwise be payable in full to the federal government. We are unable to perceive wherein such a provision would violate any constitutional right of the taxpayer. The amount he is called upon to contribute for the support of government is not increased because he has to pay this state tax.

"The nation lays a valid tax and makes valid provision for its partial distribution to the several states, through the process of local assessments and the deduction thereof from the federal tax. Substance, not form, governs in these matters; and this is the substance of the whole transaction. * * *

The Wisconsin Legislature (like that of New Hampshire) attempted to ensure that this compensating factor should not be exceeded by providing expressly that "such

estate tax hereby imposed shall in no case exceed the extent to which its payment will effect a saving or diminution in the amount of the United States estate tax payable by or out of the estate of the decedent had Sections 72.50 to 72.61 not been enacted".

The Wisconsin Estate Tax is, therefore, like its New Hampshire prototype, a tax which is ultimately measured by the entire federal estate of a decedent without regard to where his property was located. So long, however, as the compensating factor of the federal 80% credit prevents it from causing a deprivation of property, its *ultra vires* character remains of theoretical importance only.

V.

The EMERGENCY TAX is a tax equal in amount to 30% of the sum of the Wisconsin Normal and Estate Taxes. When applied to Wisconsin estates which are subject to the Wisconsin Estate Tax, it has the same inherent vice as the Wisconsin Estate Tax, being measured, not by the decedent's Wisconsin estate, but by his federal estate containing all his property wherever situated. At the same time, being levied in excess of the compensating factor of the 80% credit, it causes a deprivation of property without due process of law.

In 1935, by means of Chapter 15, Section 3 of the Laws of that year, the Wisconsin Legislature enacted the so-called Emergency Tax. This tax in its present form appears as Section 72.74 of the Wisconsin Statutes, and it is levied by subsection (2) of that section as follows:

"72.74 Emergency Tax on Inheritances (2) In addition to the taxes imposed by sections 72.01 to 72.24 and 72.50 to 72.61, an emergency tax for relief purposes, rehabilitation of returning

veterans of World War II, construction and improvements at state institutions and other state property and for post-war public works projects to relieve post-war unemployment is hereby imposed upon all transfers of property which are taxable under the provisions of said sections and which are made subsequent to March 27, 1935 and prior to July 1, 1949 which said tax shall be equal to 30 per cent of the tax imposed by said sections."

It is, in other words, a tax equal in amount to 30% of the sum of the Wisconsin Normal and Estate Taxes.

Since, as has already been noted, in the great majority of Wisconsin estates no Wisconsin Estate Tax is levied at all, this Emergency Tax usually operates merely to increase the rate of the Normal Tax by 30%. So long as this is its only effect, it is unexceptionable. In those Wisconsin estates, however, which are also subject to the Wisconsin Estate Tax, its effect, as construed by the Wisconsin Supreme Court in this case, is entirely different. Since the Normal and Wisconsin Estate Taxes, together with any taxes which may have been paid to other states, are, in the aggregate, exactly equal to the 80% credit, it is obvious that, in estates subject to the Wisconsin Estate Tax, the Emergency Tax is itself equal to 30% of the 80% credit after the latter has been reduced by the amount of the out-of-state taxes (if any). Further simplified, this means that the Emergency Tax, on such estates, is always equal to 24% of the federal basic tax less 30% of any out-of-state taxes. The Emergency Tax is, therefore, a tax which is measured, not by the Wisconsin estate of a decedent, but by his federal estate, containing all his property, wherever situated.

At the same time, in Wisconsin estates which are subject to the Wisconsin Estate Tax, the full amount of the

federal 80% credit is exhausted by the Wisconsin Estate Tax. Thus the Emergency Tax, being levied in addition to the Wisconsin Normal and Estate Taxes, is levied in excess of the compensating factor provided by the 80% credit, and its levy results in an actual deprivation of property.

All this can be demonstrated by means of an example. Assume a Wisconsin Estate, which owns real or tangible property outside the taxing jurisdiction of Wisconsin, and which has paid a federal basic tax of \$125,000 on its federal estate. Assume further that the Wisconsin Normal Taxes on the Wisconsin part of the estate amount to \$50,000 and that succession taxes of \$10,000 have been paid to other states. The computation used by the Wisconsin Supreme Court, in its opinion below, would arrive at the Wisconsin taxes as follows:

(1) <i>Normal Tax</i>		\$ 50,000
(2) <i>Wisconsin Estate Tax</i>		
Federal 80% Credit	\$100,000	
Less: (a) Normal Tax	\$50,000	
(b) Other State taxes	10,000	
Total State Taxes	60,000	
Difference		\$ 40,000
(3) <i>Emergency Tax</i>		
Normal Tax	\$50,000	
Wisconsin Estate Tax	40,000	
Total	\$90,000	
30% of Total		27,000
Total Wisconsin Taxes		\$117,000

These figures make it clear that the Emergency Tax of \$27,000 is levied in excess of the federal 80% credit of \$100,000. This credit has been exhausted by the Wisconsin Normal and Estate Taxes and by the taxes paid to other states (\$50,000 plus \$40,000 plus \$10,000). As a re-

sult the Emergency Tax is not subject to the compensating factor of the 80% credit, and, if it were not paid to the State of Wisconsin, would not have to be paid at all.

At the same time it should be noted that the Emergency Tax on this hypothetical estate constitutes an outright adoption by the State of Wisconsin of a portion of the federal tax structure. This is manifest from the fact that it is not even necessary to know the value of the decedent's Wisconsin estate in order to compute it. The only information required is the amount of the federal basic tax and the amount of taxes paid to other states, the computation being as follows:

Federal Basic Tax	\$125,000	
24% Thereof		\$30,000
Taxes paid Other States	10,000	
30% Thereof		3,000
Difference = Emergency Tax		\$27,000

This same simplified method of computation can be used to determine the Emergency Tax in any Wisconsin estate which is also subject to the Wisconsin Estate Tax. The additional figures in the method of computation used by the Wisconsin Supreme Court add nothing to the result, the Normal Tax being included at the start merely in order that it may be deducted at a later stage. Thus, in the estate of Fred A. Miller, an Emergency Tax of \$172,015 was assessed. The federal basic tax on his federal net estate of \$6,843,044 (including his property in Illinois and Florida) was \$788,387. The taxes paid to Illinois and Florida totalled \$57,326. Using these figures only, the Emergency Tax can be computed in the same manner:

Federal Basic Tax	\$788,387	
24% Thereof		\$189,213
Taxes paid Other States	57,326	
30% Thereof		17,198
Difference = Emergency Tax		\$172,015

Again it is emphasized that the Emergency Tax on such estates goes beyond the point where the taxpayer is compensated by the federal 80% credit, and represents an actual deprivation of property.

VI.

The extra-jurisdictional operation of the EMERGENCY TAX can be further seen from a comparison of the tax the Miller Estate would have had to pay had it owned no property beyond the taxing jurisdiction of Wisconsin. This indicates that \$20,203 of the Emergency Tax paid by the Miller Estate is attributable to and measured by property of the estate located in Florida and Illinois.

The measure of the Emergency Tax which, in the instant case, has been levied by the State of Wisconsin on property outside its taxing jurisdiction may be determined by computing what the Wisconsin taxes on the Miller Estate would have been had Mr. Miller owned no property in Illinois and Florida, and comparing them with the taxes actually assessed.

Mr. Miller's net estate for the federal basic tax (per settlement agreement) was \$6,843,043.95. The basic tax thereon was computed as follows:

Basic Tax on \$6,000,000.00	\$653,500.00
Basic Tax on \$843,043.95 at 16%	134,887.03
	<hr/>
	\$788,387.03

Mr. Miller's real and tangible personal property in Illinois and Florida was valued at \$979,936.23. The death duties paid those states aggregated \$57,325.71. The Wis-

consin Emergency Tax, as computed by the Wisconsin Supreme Court, below, was \$172,015.20.

If Mr. Miller's Wisconsin estate had been the same, but if he had not owned any property in Illinois and Florida, his net estate for the federal basic tax would have been \$6,843,043.95 less \$979,936.23, or \$5,863,107.72. The computation of the federal basic tax would then be:

Tax on \$5,000,000.00	\$503,500.00
Tax on \$863,107.72 at 15%	129,466.16
	<hr/>
	\$632,966.16

The 80% credit would be 80% thereof, or \$506,372.93. The Wisconsin taxes, computed in the manner used by the Wisconsin Supreme Court, would then be:

Normal Tax		\$220,682.12
Estate Tax		
80% Credit	\$506,372.93	
Less Normal Tax	<u>220,682.12</u>	
Difference		285,690.81
Emergency Tax		
Normal Tax	\$220,682.12	
Estate Tax	<u>285,690.81</u>	
Total	\$506,372.93	
30% Thereof		<u>151,911.88</u>
Total Wisconsin Taxes		\$658,284.81

Thus, the increase in the Emergency Tax attributable to the existence of his property beyond the taxing jurisdiction of Wisconsin is \$172,015.20 less \$151,911.88, or \$20,103.32. That this represents an Emergency Tax levied upon and measured by Mr. Miller's out-of-state property is shown by the fact that it is exactly equal to 24% of the

federal basic tax on this out-of-state property, less 30% of the taxes levied by the states of Florida and Illinois. The computation is as follows:

Federal basic tax on estate including out-of-state property:	\$788,387.03
Federal basic tax on Wisconsin estate alone	632,966.16
<hr/>	
Basic Tax on out-of-state property	\$155,420.87
24% Thereof	37,301.01
Out-of-state taxes \$57,325.71	
30% Thereof	17,197.70
<hr/>	
Difference	\$20,103.31

Since the federal basic tax on this Illinois and Florida property was assessed partly at the 15% and partly at the 16% bracket, the Wisconsin Emergency Tax actually consists of a tax at the rate of approximately 3.8% (i.e., 24% of 15.9%) on the value of this property (\$979,936.23) less credit for 30% of the taxes paid to Illinois and Florida.

VII.

The extra-jurisdictional operation of the EMERGENCY TAX can be seen with especial clarity in cases where the estate of a Wisconsin decedent contains property beyond the taxing jurisdiction of Wisconsin, but where no death duties have been paid to any states other than Wisconsin. In such circumstances it is possible for the Emergency Tax to exceed the value of the entire Wisconsin estate.

The situation where the estate of a Wisconsin resident contains real or tangible personal property located outside the taxing jurisdiction of Wisconsin, but where no

tax is payable to any state other than Wisconsin, can arise in a number of circumstances. In particular, the property may be located in a state which levies no death duties, or it may fall within an exemption granted by the state where it is located, or it may consist of tangible personal property located outside the United States. In such cases, when the estate is subject to a Wisconsin Estate Tax, the extra-jurisdictional operation of the Wisconsin Emergency Tax becomes particularly clear, since its rate then is exactly equal to 24% of the federal basic tax. Moreover, in such cases the Emergency Tax on an estate will remain the same regardless of what proportion of its property may be located within or without the taxing jurisdiction of Wisconsin.

To illustrate, let us assume that two Wisconsin residents die and that the first leaves a net estate, after deduction of debts, expenses of administration, etc., of \$600,000 located entirely in Wisconsin. The second leaves a Wisconsin estate of \$300,000 and also other property of the value of \$300,000 located outside the taxing jurisdiction of Wisconsin under circumstances where no taxes are payable to any other state. In each case the decedents' federal estates would be the same. The federal basic tax in each case would be \$17,500 and the 80% credit would be \$14,000. Assume further that the Wisconsin Normal Tax amounts to \$13,000 on the \$600,000 Wisconsin estate, and \$6,000 on the \$300,000 Wisconsin estate. These figures may be assumed arbitrarily, since, so long as they are less than the 80% credit, they have no real effect on the amount of the Emergency Tax. The following computations, performed in the manner prescribed by the Wisconsin Supreme Court, show that the State of Wisconsin would

levy the same Emergency Tax on both estates. Thus in the case of the \$600,000 Wisconsin estate:

(1) <i>Normal Tax</i>		\$13,000
(2) <i>Wisconsin Estate Tax</i>		
Federal 80% Credit	\$14,000	
Less Normal Tax	\$13,000	
Taxes paid other states	0	
Total	<u>13,000</u>	
Difference		1,000
(3) <i>Emergency Tax</i>		
Normal Tax	\$13,000	
Wisconsin Estate Tax	1,000	
Total	<u>\$14,000</u>	
30% of Total		4,200
Total Wisconsin Taxes		<u>\$18,200</u>

Likewise in the case of the \$300,000 Wisconsin estate:

(1) <i>Normal Tax</i>		\$ 6,000
(2) <i>Wisconsin Estate Tax</i>		
Federal 80% Credit	\$14,000	
Less Normal Tax	\$ 6,000	
Taxes paid other States	0	
Total	<u>6,000</u>	
Difference		8,000
(3) <i>Emergency Tax</i>		
Normal Tax	\$ 6,000	
Estate Tax	8,000	
Total	<u>\$14,000</u>	
30% of Total		4,200
Total Wisconsin Taxes		<u>\$18,200</u>

In each case not only are the Emergency Taxes of \$4,200 identical, but the total Wisconsin Taxes of \$18,200 are identical as well. Also, in each case the Emergency Tax equals exactly 24% of the federal basic tax of \$17,500. It is obvious from this example that the Emergency Tax is being measured, not by the Wisconsin Estate, which, in the second example, is half what it is in the first, but by the entire estate of the decedent which in each case remains the same.

In certain special cases of this sort, the extra-jurisdictional operation of the Emergency Tax can result in total confiscation of the Wisconsin estate. For an example of this, let us assume that the estate of a decedent resident of Wisconsin, after the payment of all debts and costs of administration, contained the following property:

Real Estate and Securities in Wisconsin	\$ 35,000
Real Estate in Nevada	\$2,000,000

Only the \$35,000 of Wisconsin property would be subject to the taxing jurisdiction of Wisconsin, but the decedent's federal estate would include his property in both states. Nevada has no inheritance or estate tax. The federal estate tax on this estate computed to the nearest dollar would be \$639,830. The federal basic tax would be \$127,650, and the 80% credit would amount to \$102,120. The proportional part of the federal taxes deductible from the decedent's Wisconsin estate under Section 72.04 (8) of the Wisconsin Statutes would be \$11,004, leaving a net Wisconsin Estate of \$23,996. Assuming that the decedent left this \$23,996 to his widow, resulting in a Nor-

mal Tax of \$180, the Wisconsin taxes on this estate would be as follows:

(1) Normal Tax		\$ 180
(2) Wisconsin Estate Tax		
Federal 80% Credit		\$102,120
Less: Normal Tax	\$ 180	
Other State Taxes	0	
	<hr/>	
Total State Taxes		180
		<hr/>
Difference		101,940
(3) Emergency Tax		
Normal Tax	\$ 180	
Wisconsin Estate Tax	101,940	
	<hr/>	
Total		102,120
30% of Total		30,636
		<hr/>
Total Wisconsin Taxes		\$132,756

The Emergency Tax of \$30,636 levied against this estate is again exactly 24% of the federal basic tax of \$127,650, and it exceeds by over \$6,000 the net Wisconsin estate which is being taxed. This is perhaps an extreme example, but it represents the inevitable consequence of measuring a tax by something other than the property which is being taxed.

VIII.

The preceding examples show that in all cases where Wisconsin estates are subject to the Wisconsin Estate Tax, the EMERGENCY TAX constitutes an outright adoption by the State of Wisconsin of a portion of the federal tax structure. Such action by a state cannot be reconciled with the rule of *Frick v. Pennsylvania*.

If a state desires to levy an inheritance tax upon its residents, it must enact a tax of its own which expressly takes

into account, in every one of its applications, what the state has and has not power to tax. It may not, under the rule of *Frick v. Pennsylvania*, adopt to its own use a portion of the federal tax structure. The property over which the federal and state taxing powers extend is not the same, and what is a proper measure for a tax in the one case is improper in the other. Yet the preceding examples show that the State of Wisconsin, in levying the Emergency Tax upon estates which are also subject to the Wisconsin Estate Tax, has attempted just such an adoption of the measure and structure of the federal basic tax.

The Wisconsin Supreme Court, in its opinion, made the following statement regarding the constitutional question raised in this case:

[Transcript, p. 15]

"We are of the opinion that there is no such question presented on the facts in this case. While it is true that the estate tax is imposed in a 'catch-all' manner by absorbing eighty per cent of the federal death tax, it is apparent that more than eighty per cent of the gross estate of Mr. Miller was within Wisconsin and therefore subject to taxation by this state.

"It is argued by counsel for respondent and *amici curiae* that situations might arise where such portion of the estate lay outside Wisconsin that to levy a tax under sec. 72.74, Stats. at all would be to tax property beyond the state. It would seem patent that in imposing the emergency tax, as in imposing the normal tax, care must be used to avoid taxing property beyond the jurisdiction of this state. However, we need make no further effort in pursuit of such speculation. We are met with no such situation here, since eighty-six per cent of the property belonging to the Miller estate was located in Wisconsin and the emergency tax imposed under the State's computation is upon

something less than eighty per cent of the total federal taxes. As applied to the facts of this case, therefore, the computation does not constitute an attempt to levy a tax upon nor to measure a tax by property having a situs outside of Wisconsin, and must be held to be valid."

This statement is not an adequate answer to the question. In the first place, the Wisconsin Estate Tax as construed by the Wisconsin Court, absorbed a full 80% of Mr. Miller's federal basic tax before the Emergency Tax was even applied. The Emergency Tax was levied above and beyond both the Wisconsin Estate Tax and the 80% credit. As the preceding examples have amply shown, it was measured by Mr. Miller's *entire* federal estate, and its rate is equal to 24% of the *entire* federal basic tax, less 30% of the out-of-state taxes. In the second place, the apparent import of the above statement is that, in the opinion of the Wisconsin Court, the state could levy a tax equal to 80% of the federal estate tax (whether "basic" or "additional") and still be immune to objection on the part of any estate having more than 80% of its property in Wisconsin. If this is the meaning of the Wisconsin Court's statement, it is manifestly incorrect. The objectionable feature of such a tax, under the *Frick* rule, would not be its *rate*, but the fact that it would be *measured* by a federal estate containing property beyond the taxing jurisdiction of Wisconsin. For a state to levy such a tax, equal to 80% of the federal tax, would be to set the *rate* of its tax 20% below the rate of the federal tax. This would be the only difference between the two taxes. Both taxes would still be *measured* by the entire federal estate. To contend otherwise would be to contend that a state may tax the entire property of a resident decedent at a rate, for example, of 5% of that property, and still not be subject to objection.

so long as more than 5% of the decedent's property is located within the jurisdiction of the state. So to hold would be to reverse the rule of *Frick v. Pennsylvania*, on the very facts of that case.

So long as the Emergency Tax, as construed by the Wisconsin Supreme Court, remains on the books, the only data which in all events will be necessary to compute the Emergency Tax on Wisconsin estates which are subject to the Wisconsin Estate Tax will be the amount of the decedent's federal gross estate. In those estates which have paid death duties to states other than Wisconsin the amount of those death duties will be required. In no case, however, will it be necessary to know the value of the decedent's Wisconsin estate. This anomalous situation merely emphasizes the fact that, in such estates, the Emergency Tax is a tax on the decedent's property outside the taxing jurisdiction of Wisconsin and that it is invalid under the rule of *Frick v. Pennsylvania*.

CONCLUSION

In summary of the foregoing argument, it is, therefore, respectfully submitted that the Wisconsin Estate Tax and the Emergency Tax based thereon are levied, in part, on the transfer of, or succession to, and are measured by the value of property beyond the state's taxing jurisdiction.

The Wisconsin Estate Tax, standing alone, does not result in the taking of property, since it is offset by the federal 80% credit. Since the Wisconsin Estate Tax exhausts the federal 80% credit, the Emergency Tax results in a taking of property, and a taking without due process of law, and is in direct conflict with the Fourteenth Amendment.

In the last five paragraphs of the opinion (Transcript, pp. 14 and 15) the court below indicates a consciousness of the danger of border line encroachment on the Fourteenth Amendment. The view is taken that "it is the first duty of the court to give *effect* to the law as passed if the *purpose* is lawful"; that "*The purpose of tax laws is to produce revenue for the state*"; that "Certainly *that was the purpose* of the legislature when it enacted *the emergency tax*"; and that an interpretation "giving it [the law] effect is more reasonable and must be adopted, unless to do so violates the taxpayer's constitutional guarantees." His guarantee of due process of law grows faint where the purpose to produce revenue is thus emphasized.

The concluding sentence in the opinion reads:

"As applied to the facts of this case, therefore, the computation does not constitute an attempt to levy a tax upon nor to measure a tax by property having a situs outside of Wisconsin, and must be held to be valid."

If, in order to avoid that consequence in some other case, a different interpretation will be adopted, then there is also a denial of the equal protection of the law.

J.

GILBERT HARDGROVE,

Amicus Curiae

MILLER, MACK & FAIRCHILD,

Of Counsel